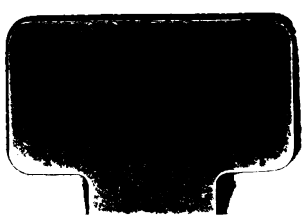

THE LAW RELATING TO

SIMONY

CONSIDERED, WITH A VIEW TO ITS

REVISION.

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LAW RELATING TO SIMONY

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CONSIDERED.

THE prohibition of anything by Law naturally raises a prejudice against it, and we are apt to attach the idea of moral guilt to an act, as if in itself intrinsically evil, which would not be wrong unless forbidden by a supreme authority. Thus with respect to Usury,—there can be no doubt that in this country the stringent enactments formerly in force habituated people to the idea, that it was a *malum in se*, and not merely a *malum prohibitum*, to take more than five per cent. on an advance of money; or in other words, that the remark once said to have been made in the Legislature by an honourable member, who declared that five per cent. was the *natural* interest of money, did not appear to most persons so absurd as it certainly was. The Game Laws are another instance of a similar kind; and I think it will not be difficult to show, that the state of the Law in England against Simony is an example of the same confusion of thought,

and that an entire revision of it is urgently called for, to rescue it from many anomalies and inconsistencies, and give validity to transactions which, though at present illegal, appear to be in themselves unobjectionable: or at all events not more objectionable than many things of a kindred nature, which the law applicable to the subject allows.

I propose, in the following pages, first, to give a cursory history of the English law relating to Simony from the earliest times. Secondly, to show briefly the state of the law now respecting it. And, thirdly, to suggest some alterations which are, I think, much needed. My object is to remove unnecessary restrictions, and relieve certain transactions from the undeserved odium which attaches to them as Simoniacal; for in Church matters the terms Simoniacal and corrupt are considered as synonymous.

If I imagined for a moment, that a relaxation of the law against Simony would injure the Church of England, or loosen one single stone of her venerable fabric, which is, I trust, destined to last until time shall be no more, I should not care to call attention to the subject. But the removal of anomalies need not endanger institutions. My earnest desire is to see the Church unfettered, where she is, as I think, unwisely restrained; and I shall attempt to prove, that we have in modern times applied the terms Simony and Simoniacal, to contracts and transactions very different from those contemplated in the early periods of the history of the Church.

The origin of the term Simony is well known. (*a*) In the times of the Apostles, Simon Magus, a "sorcerer," of Samaria, offered money to Peter and John to purchase from them the power "that on whomsoever I lay hands "he may receive the Holy Ghost." Now if ever a corrupt proposal was made in this world, here was one —and of the most flagrant kind. It was an attempt to bribe the Apostles of the Lord to communicate a supernatural gift. "Thy money perish with thee, because "thou hast thought that the gift of God may be pur- "chased with money," was the stern and fitting rebuke which the unholy trafficker received. In this fact then we have the first instance of the species of corruption called Simony: and we see that it was nothing more nor less than a bargaining with money for spiritual power. But the authority to appoint to the sacred office of ministers of the Church was vested in the Apostles and their successors, and was communicated by the laying on of hands. It might, therefore, naturally be supposed, when the period for working miracles was gone by, and no powers of this kind could be bestowed by any, even though divinely appointed forms, that the offence most nearly approaching that which brought down on Simon Magus the anger of the Apostles, would be an attempt to procure by money admission into the number of the Christian priesthood. This was effected by the imposition of the hands of the Bishop,

(*a*) In the words of Lord Coke, 3 Inst. 153. "Simonia est vox "ecclesiastica a Simone illo Mago deducta, qui donum Spiritus "Sancti pecuniis emi putavit."

and as such ordination would be a distinction coveted by many, it would in corrupt times be likely to offer temptations to bribery. Accordingly we find that such was the fact. St. Gregory says, "Sed Redemptor noster "Cathedras vendentium columbas evertit, quia talium "negotiatorum sacerdotium destruit. Hinc est enim "quod sacri canones Simoniacam hæresim damnant, et "eos privari sacerdotio præcipiunt qui de largiendis "ordinibus pretium quærunt." And again, "Quicun- "que sacros ordines vendunt aut emunt sacerdotes esse "non possunt, ut scriptum est. Anathema danti, ana- "thema accipienti, hæc est Simoniaca hæresis." (*a*) And by the schoolmen and older canonists, Simony was defined to be, "Studiosa voluntas emendi vel vendendi "aliquid spirituale aut spirituali annexum opere sub- "secuto." (*b*) I might quote the authority of St. Athanasius, St. Basil, St. Chrysostom, St. Jerome, and St. Augustin to the same effect. The latter says, (Augustin, Tract. cap. 2.) "Caveant a flagello de resticulis, columba "(*i. e.*, spiritus sanctus) non est venalis; gratis datur, "quia gratia vocatur. . . . . Circuit ergo aliquis "emere columbam; unusquisque ad propositum suum "laudat quod vendit." And the thirty-second Apostolical Canon takes the same view of the offence. It is headed, "Quod non debeant officia ecclesiastica pecuniis

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(*a*) See Degge, chap. SIMONY.

(*b*) I apprehend that the words *spirituali annexum* refer to such rites as baptism, burial, extreme unction, &c., and not to any of the temporalities of the Church. My reasons for this interpretation will appear in the course of my argument.

" obtineri," and is as follows; " Si quis Episcopus aut " Presbyter, aut Diaconus per pecuniam hanc obtinuerit " dignitatem, dejiciatur, et ipse, et ordinatu ejus, et a " communione modis omnibus abscindatur, sicut Simon " Magus a Petro." And the same kind of offence seems, in this country, to have been originally the only one contemplated under this appellation, for the earliest mention of Simony occurs in the resolutions of the Council held at Winchester, A.D. 1070, of which the two first are headed, 1. " De introitu Episcoporum et " Abbatum per Simoniacam hæresim." 2. " De Ordi- " nationibus passim factis et per pretium." And in another council held in the same place, A.D. 1076, the second resolution is " Quod nullus per Simoniacam " hæresim ordinetur." And one of the canons passed in the council held in London, A.D. 1075, over which Archbishop Lanfranc presided, is as follows, " Decretum " est, ut nullus sacros ordines seu officium Ecclesiasticum, " quod ad curam animarum pertineat, emat vel vendat. " Hoc enim scelus a Petro Apostolo in Simone Mago " primitus damnatum est. Postea a sanctis patribus " vetitum et excommunicatum." (*a*)

So in the canons of Archbishop Richard of Canterbury, A. D. 1175, which were taken from former councils and decrees, it is laid down, " The holy synod detests " Simoniacal heresy, and ordains that nothing be de- " manded for orders, christenings, baptisms, extreme

(*a*) See Spelman's *Concilia.*

"unction, burial, communion, nor the dedication of a "church, but what is freely received be freely given."

In these instances the word seems to be used in its proper and legitimate sense, and to denote the sale and purchase of holy orders. But it soon came to have a wider signification, and to apply to the case of preferment *after* ordination. Thus in the canons of Archbishop Corboyl, framed A. D. 1126 and 1127, it is said, "We, following the ancient fathers, forbid by "Apostolical authority, any man to be ordained for "money;" and, "By the authority of Peter the Prince of "the Apostles, and our own, we forbid churches, bene-"fices, and dignities to be in anywise sold or bought. "If the offender be a clergyman (though a regular canon "or monk) let him be degraded; *if a layman*, let him be "outlawed and excommunicated;" and, "by the authority "of the Apostolical See, we wholly forbid any man to "be ordained or preferred by means of money."(*a*)

Lyndwood (*b*) gives the following as one of the CONSTITUTIONES PROVINCIALES of the Archbishop Richard before mentioned, "Nulli liceat ecclesiam nomine dota-"litatis ad aliquam transferre, vel pro præsentatione "alicujus personæ pecuniam, vel aliquid emolumentum, "pacto interveniente, recipere. Quod si quis fecerit, et "in jure convictus vel confessus fuerit, ipsum, tam regiâ "quam nostrâ freti auctoritate ejusdem ecclesiæ in per-"petuum privari volumus."

(*a*) See Johnson's Ecclesiastical Laws.
(*b*) Lib. 5, tit. 3.

I am aware that it has been contended, that the view of the ancient and more modern canonists on this subject has been the same; and it has been said, that the former inveighed against Simony in the purchase and sale of holy orders, and the latter against Simony in the collation and provisions of benefices, simply because the change of times and manners had rendered censure in the latter case more necessary than in the former; and it has been asserted that the Church has throughout attached the same notion to Simony. (*a*) This may *possibly* be true, but it is by no means proved to be so; nor is it to be taken for granted. And since for a long period of time the purchase and sale of livings in this country, with a view of providing for relatives and friends, or even as a money speculation, has been held to be perfectly legal, it may raise considerable doubt in the mind of a reflecting person, whether it is just or expedient to brand as Simoniacal a transaction where a clergyman purchases a presentation for himself: and yet, as a matter of every day occurrence, allow a patron to sell the same presentation to a layman, who wishes to provide for somebody who has a claim upon him.— But I must not anticipate another part of my subject.

It is a question involved in some doubt whether Simony was an offence at Common Law. Lord Coke (*b*) says, "Simony is odious in the eye of the Common

(*a*) See the *Dean of York's case*, cited in Burn's Ecclesiastical Law, by Phillimore, vol 3, title SIMONY.

(*b*) In 3 Inst. 156.

"Law;" and again, "Simony is the more odious, "because it is ever accompanied with perjury." But in a case in the time of Elizabeth, it was decided that Simony was not against our law; *i. e.*, the Common Law. The first statute on the subject is the 31 Eliz. c. 6. The first four sections of this Act relate to Simoniacal elections, presentations, and nominations of scholars, fellows, or any other persons, to any church collegiate or cathedral, colleges, schools, hospitals, halls or societies. Section 5 prohibits the presentation or collation of any person, to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, for any sum of money, reward, gift, or profit, directly or indirectly, or for any promise or agreement for any sum of money or other reward; and enacts, that in such case every such presentation or collation, and the admission and institution thereupon, shall be utterly void, and that the Crown may present to every such benefice or dignity for that one time or turn only; and that the person so corruptly seeking or accepting any such benefice, shall thenceforth be adjudged a disabled person in law, to have or enjoy the same benefice or dignity.

Section 6 provides, that if any person shall for money, reward, gift, profit, or commodity whatsoever, directly or indirectly, (other than for usual and lawful fees); or by reason of any promise, agreement, grant, covenant, bond, or other assurance; or, for money, reward, gift, profit, or benefit whatsoever, directly or indirectly, admit, institute, install, induct, invest, or place in, or to, any benefice with cure of souls, dignity, prebend, or other

living ecclesiastical, every person so offending shall forfeit and lose the double value of one year's profit of such benefice, &c. That immediately from and after the induction, &c., thereof had, the same benefice, &c., shall be eftsoons merely void. And the patron or person to whom the advowson, gift, presentation, or collation shall appertain, shall and may present or collate unto, give and dispose of the same benefice, &c., in such sort, to all intents and purposes, as if the party so admitted, &c., had been and were naturally dead.

Section 8 enacts, that if any incumbent of any benefice with cure of souls, do or shall corruptly resign, or exchange the same, or corruptly take for, or in respect of, the resigning or exchanging of the same, directly or indirectly, any pension, sum of money, or benefit whatsoever, in that case, as well the giver as the taker of any such pension, &c., shall lose double the value of the sum so given, taken, or had, and double the value of one year's profit of every such benefice.

Section 10 provides, that if any person shall receive or take any money, reward &c. (as in sec. 6,) or shall take any promise, &c., to have any money, &c., directly or indirectly, either to himself or any of his friends, or to any other of his or their friends, (all ordinary and lawful fees only excepted,) for or to procure the ordaining or making of any minister or ministers, or giving of any orders or licenses to preach, every person so offending shall, for every such offence, forfeit and lose the sum of 40*l.*, and the party so corruptly ordained or made minister, or taking orders, shall forfeit and lose the sum of

10*l*.; and if within seven years next after such corrupt entering into the ministry, or taking of orders, he shall accept or take any benefice, living, or promotion ecclesiastical, immediately from and after the induction, &c., the same shall be merely void, and the patron may present as if such person were dead, (as in sec. 6,) any law, ordinance, qualification, or dispensation to the contrary notwithstanding.

This Statute indicates six cases or species of Simony.

1st. The taking of any money, fee, or reward, as a consideration for voting in a college election, or in that of any spiritual body corporate.

2nd. The taking of any money or other benefit to resign any fellowship or other place in such a body.

3rd. The presenting or bestowing of benefices with cure of souls for money or reward.

4th. Admissions, institutions, and collations for money or reward.

5th. Corrupt resignations or exchanges of benefices with cure of souls.

6th. The taking of any money (beyond the ordinary and lawful fees,) to procure the ordaining or making of any minister, or to procure the giving of any orders or license to preach.

Gibson lays it down, (*a*) as follows:—"Although the "most plain and direct Simony is, when the Church is "become void, and the void turn, or the procuring of

(*a*) See Codex, 840.

" it, is contracted for; yet, there may be many kinds " of unlawful contracts within this statute (31 Eliz. c. 6,) " while the Church is full of an incumbent." And he cites a passage from the *Reformatio Legum*, to the effect that it is Simoniacal to make any promise, or hold out any hope to any one of a presentation to a benefice, before it is actually vacant. But this cannot be considered to be the law now.

At the period of the Reformation, it was ordained by one of the injunctions of Edward 6, A.D. 1547, which were afterwards republished and confirmed by Queen Elizabeth, A.D. 1559, " To avoid the detestable sin of " Simony, because buying and selling of benefices is " execrable before God, therefore, all such persons as buy " any benefices, or come to them by fraud or deceit, " shall be deprived of such benefices, and be made un- " able at any time to receive spiritual promotion; and " such as sell them, or by any colour do bestow them " for their own gain and profit, shall lose the right " and title to the patronage and presentment for that " time, and the gift thereof, for that vacation, shall " belong to the king's Majesty."

And by the 40th Canon, (A.D. 1603,) of those now binding upon the Anglican clergy, the following oath is prescribed to be taken by every spiritual person on being promoted to any ecclesiastical preferment:—" I, A. B., " do swear that I have made no simoniacal payment, " contract, or promise, directly or indirectly, by myself, " or by any other to my knowledge, or with my consent,

" to any person or persons whatsoever, for or concerning, " the procuring and obtaining of the living of S., in the " diocese of London, [or, as the case may be,] nor will " at any time hereafter perform or satisfy any such kind " of payment, contract, or promise, made by any other " without my knowledge or consent. So help me God, " through Jesus Christ."

By the statute, 12 Anne, c. 12, it was enacted, that if any person shall or do for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for, or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented and collated thereupon, that then every such presentation or collation, &c., shall be utterly void, prostrate, and of no effect in law, and such agreement shall be deemed and taken to be a Simoniacal contract. Then follow the disabilities and penalties provided by the statute in such cases.

By statute 3 & 4 Vict. c. 113, s. 42, it was enacted, that it shall not be lawful for any spiritual person, to sell or assign any patronage or presentation belonging to him, by virtue of any dignity, or spiritual office held by him, and that every such sale or assignment shall be null and void, to all intents and purposes. Before the pass-

ing of this Act, the *Dean of York's* case had occurred, which was a visitation instituted by the Archbishop of York, in which he had appointed Dr. Phillimore his Commissary, and in which a presentment had been made against the Dean, charging him with selling the presentations to the vicarages in his gift. The judgment of the learned Commissary was against the Dean, but the Court of Queen's Bench annulled it, on the ground that the Visitor had exceeded his powers, and that he ought to have proceeded under 3 & 4 Vict. c. 86. The opinion of Lord (then Sir John) Campbell, Attorney General, was taken, as to whether the Dean, being a spiritual person, had not been guilty of Simony, in selling the next presentation to livings in his patronage? and the opinion of the Attorney General was, "That for a spi-"ritual person to sell the next presentation of a living, "which he holds by right of his benefice, whether void-"able or not, is Simony, by the Canon Law." But it is said that, on the opposite side, both the Queen's Advocate and Dr. Nicholl gave a contrary opinion. (*a*)

Next, with regard to Bonds for Resignation. These are of two kinds, general and special. The first are bonds conditioned to resign at the request of the patron generally, or in favour of any one whom he may afterwards specify; the second are bonds, wherein the particular person in whose favour the resignation is to take place is named. A distinction was formerly thought to exist between these two kinds of bonds, in the eye of the

(*a*) See Burns' Ecclesiastical Law, by Phillimore, vol. 3, p. 647.

law, and although, on several occasions, our Courts had decided in favour of the validity of general bonds, yet this arose chiefly from technical reasons; for when such bonds were brought into question, or in the language of law demurred to, the Judges held, that as no corrupt contract was averred on the pleadings, they must presume that they were made with "an honest intent;" as for instance, in the case of the future non-residence of the incumbent, or in order that the son of the obligee of the bond (*i. e.* the patron) might have the living when able by law to hold it. Thus clearly intimating the distinction above mentioned. But in the year 1783, in the great case of the *Bishop of London* v. *Fytche*, (*a*) decided in the House of Lords, it was determined, by a majority of nineteen to eighteen, that a general bond of resignation was illegal and void. And afterwards, in the case of *Fletcher* v. *Lord Sondes*, (*b*) which came before the House of Lords in 1826, it was determined by a majority, although the Judges differed in opinion amongst themselves, that special resignation bonds were also illegal, and the judgment of the Court of King's Bench in favour of the validity of such bonds was reversed.

This decision, as the Lord Chancellor of the day (Lord Eldon) intimated, came by surprise, and bore harshly on many patrons and clergymen, who, acting under a misconception of what the law allowed, had, by taking and giving these special bonds, exposed themselves to heavy penalties. Accordingly the Archbishop of Canterbury

(*a*) Brown's Parliamentary Cases, vol. 2, p. 211.
(*b*) See Bingham's Reports, vol. 3, p. 501.

lost no time in bringing in a bill to indemnify parties, who were already implicated in such transactions, and this bill subsequently passed into a law,—the 7 & 8 Geo. 4, c. 25. But a change in the law as it then stood was soon afterwards effected by the statute 9 Geo. 4, c. 94; the first section of which provides, that every engagement for the resignation of any spiritual office, to the intent, to be manifested by the terms of such engagement, that any one person whosoever to be specially named and described therein, or one or two persons to be specially named therein, shall be presented, instituted, or collated to such spiritual office, shall be good, valid, and effectual in the law to all intents, and the performance of the same may be enforced in equity.

Section 2 provides, that the two persons to be specially named, shall each of them be either by blood or marriage, an uncle, son, grandson, brother, nephew, or grandnephew, of the patron, or of one of the patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same, &c. The rest of the Act provides for the due registration of such deeds of resignation, and requires that the person in whose favour the resignation bond was executed, shall be presented within six calendar months next after notice of such resignation given to the patron of the spiritual office.

I will, in the last place, briefly advert to the case of those who have owed their preferment to Simoniacal contracts, although they have not themselves been in any way privy or parties to such transactions. There is

a well-known distinction drawn by the Canonists between *Simoniaci* and *Simoniacè promoti*. The former are those who were cognizant of the Simony to which they owed their spiritual preferment. The latter are those who, though they came in by Simony, were not parties or privies to it. I need not discuss the former case; for, of course, as both the presentee and the patron are in *pari delicto*, it is only just and equitable that both should suffer alike; but with regard to the latter, Sir Simon Degge says, that in the latter end of the reign of James I. it was adjudged, that if a clerk were presented on a Simoniacal contract, *to which he was not party or privy*, yet notwithstanding, it was a perpetual disability upon that clerk as to that living. Other cases of a like kind occurred; and Degge says, "I must acknowledge, if the "law be so taken, it is very severe." But Coke in his third *Institute* lays it down, that where the presentee is not privy nor consenting to any such corrupt contract as is prohibited by the 31 Eliz. c. 6, he shall not be adjudged a disabled person within the Act, because it is no Simony in him. And the same great legal authority says, (*Reports*, pt. 12, 73,) that it was agreed by all the Justices and Barons, that if a patron, for money, present any person to a benefice with cure of souls, then such presentation and the institution thereupon is void, although the presentee be not party nor privy to the corrupt contract. And there is an obvious distinction between the two cases. The presentation is rendered void by the very words of the statute. But the clerk himself being guilty of no "corrupt taking" is not affected by the disabling clause. So in *Gibson's Codex*,

844, it is said of a spiritual person, that "If he be only "*Simoniacè promotus*, (by Simony between two strangers "to which he is not privy) he is deprived by reason "of the corruption, but not disabled to take any other "living." With regard to the Canon Law on this subject, in the case of *Whish* v. *Hesse*, (*a*) *Sir J. Nicholl* in delivering judgment said, "The authorities do not "quite satisfy me that the Canon Law had ever been so "far received in this country as to render a clerk "*Simoniacè promotus*, but not privy, liable to be de- "prived, or that such was the law of this country before "the statute of Elizabeth. . . . In the case before "the Court, there is no privity before, nor confirmation "after, nor was the incumbent informed that any money "was given, or promise made. The fact that any contract "or obligation was entered into was denied throughout. "In the judgment of the Court, therefore, he is not "*Simoniacus*, and even if there had been proof that he "was *Simoniacè promotus*, still he has not been guilty of "any crime for which the Ecclesiastical Court in a "criminal suit can punish him, assuming that his posses- "sion was invalid under the statute."

By the statute 1 Wm. 3, c. 16, it is provided, that after the death of a person Simoniacally promoted, the offence or contract of Simony shall neither by way of title in pleading, or in evidence to a jury, or otherwise, be alleged or pleaded to the prejudice of any other patron innocent of Simony, or of his clerk by him presented or promoted,

(*a*) Haggard's Reports, vol. 3, p. 659.

upon pretence of lapse to the Crown, or to the metropolitan or otherwise, unless the person, Simoniac or Simoniacally promoted, or his patron, was convicted of such offence at the Common Law, or in some Ecclesiastical Court, in the lifetime of the person Simoniac or Simoniacally promoted or presented.

Secondly, let us consider what is the present state of the law on the subject of Simony.

This has been partly anticipated by the brief narrative of canons, enactments, and decisions which I have already given; but it will be useful to bring together the most important conclusions of law applicable to Simony. At present, then, the following cases would fall within the legal definition of the offence, and would expose parties to forfeiture or penalties, or loss of some kind. 1. It is Simoniacal to purchase ordination to the ministry, or induction to any spiritual office. And no one, I apprehend, would wish to see the law less stringent in this respect; nothing could be more heinous, and nothing could more effectually tend to degrade the clergy, than the idea that spiritual authority was bought and sold, and that a market value could be put upon the holy commission, derived (as we believe) in an uninterrupted chain from the Apostles themselves.

2. It is Simoniacal for a person, whether lay or spiritual, to purchase a presentation when the living is actually vacant, so that a patron cannot divest himself of the right to present tothe existing vacancy. Yet the same patron may, when the living is vacant, convey away the inherit-

ance of the advowson, so as to confer upon another the right to all the future presentations. The reason formerly assigned for this distinction, was a mere technical subtlety, that the presentation, or turn itself being a spiritual thing, annexed to the person of the patron, was not grantable, and that it was a thing in power and authority, a *chose in action*, as lawyers term it, the execution of the advowson, and not the advowson itself. But in the case of the *Bishop of Lincoln* v. *Wolferstan*, (*a*) *Lord Mansfield* and *Mr. Justice Wilmot* both said, "That the true reason "why a grant of a fallen presentation, or an advowson "after avoidance, is not good, *quoad* the fallen vacancy, "is the public utility, and the better to guard against "Simony; not for the fictitious reason of its having then "become a *chose in action*."

Now, I confess it appears to me very difficult to perceive, how it can be more improper to sell the vacant presentation under such circumstances than the vacant advowson. Whatever reasons can be urged against the one may surely be urged with equal force against the other. And yet the law makes the whole distinction of legality and illegality between the two acts.

3. It is Simoniacal, as we have just seen, to purchase a right to present to an advowson actually vacant, but not so if the incumbent be alive, although *in articulo mortis*, and although it may be morally certain that the vacancy will occur before the purchase-money is paid.

(*a*) Burrow's Reports, vol. 3, p. 1512.

Formerly, it was held to be Simony to buy the next presentation when the incumbent was sick, "and like "every way to die;" (*a*) but the law is now settled otherwise, and the case of *Fox* v. *The Bishop of Chester*, (*b*) has decided that the sale of the next presentation, the incumbent being *in extremis*, within the knowledge of both the seller and the purchaser, but without the privity or a view to the nomination of a particular clerk, is not void on the ground of Simony. The same point had been previously decided with regard to an advowson in fee in the case of *Barrett* v. *Glubb*. (*c*) Yet one would have thought that the same mischief might be done by such a sale as if the advowson or presentation were actually vacant.

In a case, decided in the reign of Elizabeth, (*d*) where a father, in the presence of his son, being a clerk, purchased the next advowson of a church, the incumbent being sick, and not likely to live, who soon after died, and the father presented his son, this was held to be Simony within the statute of 31 Eliz. c. 6; but it was said by the Judges, that if this had been done in the absence of the son, it had not been Simony, because the father is bound to provide for his son. Well might *Sir Simon Degge*, who cites this case in his *Parson's Counsellor*, add, "*Quære* of the difference?"

(*a*) *Benedict Winchcombe* v. *Bishop of Winchester*, Hobart's Reports, p. 165.

(*b*) Bingham's Reports, vol. 6, p. 1.

(*c*) W. Blackstone, vol. 2, p. 1052.

(*d*) *Smith* v. *Shelbourn*, Croke's Reports, Eliz. p. 685.

4. It is Simoniacal for a spiritual person to purchase a next presentation for himself, but the same person may purchase the advowson in fee, and so present himself to the next vacancy. On what principle are we to account for this inconsistency? Is it on the ground of public policy? But how can it be wrong for a man to buy the next presentation, if it is right for him to buy the living, and thus secure the next presentation? It is a maxim of the Common Law, that what may not be done by direct means, shall not be allowed by indirect. But the above example is a contradiction of this principle.

I am aware, that, by a Canon of the third Lateran Council, the purchase of a presentation, with the condition to present a particular person by name, as well as all *promises* of benefices, are forbidden; and the reason therein assigned is, "*Ne desiderare quis mortem proximi* "*videatur, in cujus locum et beneficium se crediderit* "*successurum.*" But this reason would apply likewise with considerable force to the purchase of an advowson in fee, where the Church is full; and yet, as we have seen, such a purchase is perfectly legal. The statute of 12 Anne, c. 12, gives a different reason, and states as the preamble to section 2, "Whereas some of the clergy "have procured preferments for themselves, by buying "ecclesiastical livings, and others have been thereby dis-"couraged." But here, again, it is obvious that this reason would *a fortiori* apply to the purchase of an advowson in fee by a clergyman, for, by the discouragement mentioned in the Act, I apprehend, is meant the

difficulty which a poor clergyman would feel himself to labour under, with regard to the chance of preferment, in comparison with a rich one, if the latter were by law allowed to purchase a presentation for himself. And the disproportion between their relative situations is surely greater, in the ratio of the difference of the value of the things they are enabled to purchase. I might instance the case of commissions in the Army, as an example of my argument. A poor subaltern is more likely to feel himself "discouraged" by the promotion of a wealthy officer, who can afford to purchase every step, in rapid succession, than by that of him who, barely richer than himself, is just able to purchase the rank immediately above him.

5. It is Simoniacal to resign or exchange any benefice with the cure of souls, in consideration of "any pension, "sum of money, or benefit whatsoever," but an exchange of benefices, between two spiritual persons may be effected. The mode of doing this, is regulated by several statutes, the principal of which is 55 Geo. 3, c. 147. Now, it is, I think, indisputable, that the reasons which induce a clergyman to exchange one living for another, *may* be as objectionable as those, which would perhaps induce him to resign or exchange it for some other kind of benefit.

6. According to strict law, as laid down in former times, it was Simoniacal and illegal for a person to purchase the next presentation to a benefice, while the

church was full, with the intention to present a particular person, and afterwards to present that person. But an exception to this rule was allowed, in the case of a father buying a next presentation for his son, and for this singular reason; because "the father is bound by nature "to provide for his son; and, therefore, his buying an "advowson, with an intent to provide for him, is not "any Simony," (*a*)—as if a father could be bound to violate a canonical or statute law, if that law was founded on good sense and reason,—and as if cases might not occur, where the duty to provide for another might be just as strong as in the relation of father and son. Now, however, no presentation would be held void, on the ground that the patron, when he purchased the next turn, had the particular presentee in view.

7. It is Simoniacal for an incumbent to resign his benefice for any pecuniary consideration, although he may be a very old man, or in very infirm health, and quite unfit for the duties of his parish. A case of the following kind frequently does occur. An incumbent has the fee of the advowson, and wishes to sell it; of course the purchaser is anxious to have the living vacant as soon as possible, and the incumbent is willing to resign at once, on receiving more for the advowson than he can get if the vacancy is to be postponed until his death. As the law stands, it would be Simony in him to make any difference in price between the two cases. But what a temptation is thus held out covertly

(*a*) See the case of *Smith* v. *Shelbourn*, Croke Eliz. 686.

to evade the law; and as a matter of fact, I have reason to believe that the law *is* frequently evaded under such circumstances as I have supposed. Surely it must be well known to every body that there are advowsons to be sold, for which one sum is to be paid if the purchaser waits for the vacancy until the death of the incumbent, and another if the latter resigns at once.

Again, it is no uncommon occurrence for a father to make provision for his son by the purchase of a living, and yet it can be easily seen how closely such a transaction may border upon Simony, so as, at least, to bring the latter within the spirit, if not the letter of the Canons and enactments against that offence. Let us suppose the case of a father, who has a son in holy orders, and who intends to leave each of his children a certain sum; an opportunity occurs of purchasing a living on advantageous terms, and the father tells his son that he will invest the money, which he intended to leave him, in the purchase of it, instead of bequeathing the money itself. Now this is a case of ordinary occurrence, and it is difficult to see how there can be anything objectionable in such an arrangement. But then comes the question, —how can the son, when the living becomes vacant, and he is presented to the Bishop for institution, conscientiously and sincerely take that solemn oath, prescribed by the 40th Canon, which has been before cited?—In the case I am supposing, the purchase-money of the living has been in reality the portion, and therefore the property of the son; and how, therefore, can he swear that he has not "directly or indirectly, by himself or by

"another," made any Simoniacal payment for or concerning the procuring and obtaining the living? I know, perfectly well, how, as a lawyer, and standing upon legal and technical distinctions, I could get rid of the difficulty, so as to avoid all penal consequences in such a case; but my question is, how can a pious and conscientious clergyman, who feels the full force and meaning of the oath which he must take, deliberately swear that he has not, by means of any other person, procured and paid for the preferment, in the case which I have supposed? Can we doubt that, if we interpret this oath according to the *animus imponentis*, such a transaction must be deemed Simoniacal?

And what is the mode adopted, where a party, whether he be a layman or a clergyman, purchases an advowson when the church is full? He immediately insures the life of the incumbent, and is thus, at the death of the latter, repaid so much of the purchase-money as he has derived no benefit from, *minus* the annual premiums which he may have paid, to keep the policy alive. Let any one test such transactions by the oath which I have before given, as prescribed by the 40th Canon, and see whether they are or are not, in violation of its spirit.

I could easily multiply instances of a similar kind, but I forbear. I do not pretend, in this cursory sketch of the subject, to point out all the contradictions contained in it. I trust that I have already made out a case of inconsistency and anomaly, in the present state of the

law, which ought not to be allowed to remain. And, I am much mistaken, if the clergy themselves would not gladly see such a revision of the whole Canon and Statute Law on the subject, as would relieve them from the burthens which the existing enactments too often impose upon their consciences. It is no theoretical perfection that I aim at, but the removal of practical grievances, which are precisely of such a kind, that the most religious and conscientious minds are most oppressed by them.

"Dat veniam corvis, vexat censura columbas."

I will now, therefore, in the third place, venture to suggest what, in my humble judgment, appears to be desirable, in the way of relaxation of the existing law. I am aware, that the views I entertain will seem to be opposed to those held by an influential body of the clergy; for, of late years, efforts have been and still are being made, to bring about a complete revolution in the mode of the disposal of Church property. The writers to whom I allude, endeavour, by exposing the undisguised and public traffic which is carried on with regard to advowsons, presentations, exchanges, and resignations, to shame their brethren into a conviction, that the purchase and sale of Church patronage is altogether a violation of their duty as Christian clergymen, so far as they are implicated in it; and that it is wholly in contravention of the spirit of the Christian religion, to allow such patronage to be the subject of sale at all. I believe that they entertain the idea of some such scheme, as

would vest the whole patronage of ecclesiastical livings in the Crown, or the Bench of Bishops, to be dispensed by it or them gratuitously, to such individuals as are, from their character and attainments, most deserving of preferment in the Church.

However this may be, were the question *res integra*, and were the Church now in her collective capacity, or the Legislature, called upon for the first time to express an opinion, whether it is right or expedient to allow ecclesiastical benefices with cure of souls, to be bought and sold like any other species of property, I can easily imagine, that many powerful arguments might be adduced in the negative, and much might be said to shew how grievously liable to abuse such a state of things, if permitted, must necessarily be. Of this I am very sure, that an entire prohibition of the sale of Church patronage, in any shape or way, would be hailed by many pious and conscientious clergymen as a great benefit to the Church. But on this important and complicated question I do not enter; nor stop to enquire as to the feasibility or probability of such a scheme being ever realized. In the following remarks, I assume the law, which permits patronage to be sold, to remain in force, and it will not be easy to discover the practical difference between such a state of things as now exists, and one in which it should be legal for the patron to receive money from the presentee himself; and, indeed, the advocates of the abolition of traffic in advowsons avow this, and use it as part of their argument.

But I think the following considerations deserve attention, although I would not be understood to commit myself to a decisive opinion, on the question of the sale of patronage. In neither of the cases supposed, can it be properly said, that any spiritual power, gift, or authority, is the subject-matter of pecuniary consideration. The clerk who has once had the hands of the Bishop laid upon him as deacon and priest, has thereby received his commission, and the whole spiritual and sacred part of his *status*, so to speak, has been already perfected; and the right to enjoy certain temporal emoluments, by virtue of the priestly office, is something quite distinct and different from this; and it is these emoluments alone which are the subject-matter of bargain and sale between a patron and a purchaser.

And it appears to me, indeed, that this is the fallacy which runs throughout the chief part of the statutory provisions against Simony which have been framed in modern times. They seem to be based on the supposition that, in the sale and purchase of a benefice, anything of a spiritual nature can be conferred or transferred. Unless this was the idea prevalent in the minds of those who were the makers of the laws on the subject, it is difficult to conceive how or in what sense the transactions prohibited could be termed Simoniacal. But the subject-matter of sale in the purchase of an advowson, is merely the right to receive the emoluments attached to the living,—a right to the commuted tithe, and the occupation of the glebe. If more than this passes, and if a spiritual right of any kind can be thus purchased,

how can it possibly be legal to buy an advowson or presentation at all?

And, even if a clergyman were allowed to purchase a presentation for himself from a patron, he would not, any more than a layman, buy any spiritual authority over the benefice, for *that* is conferred solely by the institution of the Bishop, which, of course, it would be Simoniacal, in the literal sense, to make the subject of a money-purchase.

But, it may be urged on the other side, that the sale of a benefice involves, in reality, the cure of souls, for that the right of a spiritual person to receive the emoluments, is inseparably connected with this,—so that the patron, who sells a living, does virtually sell the right to exercise spiritual authority over a certain district. But although this might be a strong argument against the *legality* of the sale of benefices *altogether*, it is hardly an argument in favour of the distinctions which now exist. But, to strengthen the view I take of such a sale, as not being in any sense Simoniacal, however much may be said against it as inexpedient and liable to abuse, upon which I give no opinion, I will instance the case of the appointment of a Bishop. This, as every body knows, is really in the gift of the Crown, but certain forms are observed, which keep up the semblance of an election by the Church. A *conge d'elire* is sent down to the Dean and Chapter, who would, however, if they refused to elect the nominee of the Crown, incur the penalties of a *præmunire*, and so also would the Archbishop or Bishop

who refused to confirm or consecrate him. (*a*) But it cannot be in any sense said, that the Crown confers any portion of spiritual authority upon the newly made Bishop, nor could the Crown by any possibility transfer his spiritual authority to any other. So neither can a private patron buy or sell anything of a really spiritual nature.

I have before stated, that I do not wish to propose the slightest degree of change in the law against Simony, when that word is taken in what is, I conceive, its etymological and proper sense, that is, the sale and purchase of holy orders, or any other spiritual dignity or authority. The mind revolts against the idea of such a profanation; and at the present day, happily, the only reason, perhaps, that could be urged against the Canon and Statute Law on the subject is, that the thing itself is so impossible, from the character of our hierarchy, as to render the enactments of the law unnecessary.

But since, however the custom may have originated, it is now firmly established, that presentations and advowsons in fee may be bought and sold; and, moreover, a *quare impedit* will lie against a Bishop, who refuses to institute a clerk presented to him by the purchaser, the question naturally arises,—why may not a spiritual person buy a presentation for himself? I have before stated that he may by law become the purchaser of the advowson in fee, and thus *indirectly* purchase the next

(*a*) Stat. 25 Hen. 8, c. 20.

presentation, and it is not easy for a plain understanding to see the difference between the two cases.

The next alteration which I would venture to suggest in the law is, that it should be legal to buy and sell a presentation, when the living, or as it called the turn, is actually vacant. If, as I have shown, this may be done, when the incumbent is beyond all hope of recovery, and the living therefore is *virtually* vacant, it is impossible, I think, to contend that it is more improper to allow it, when the living is *actually* vacant. The law, as it now stands, is anomalous, and imposes a restriction and limitation for which no sound reason can be assigned. Either, therefore, let the sale of a next presentation be declared illegal, or let the law permit the sale of a presentation, when the church is vacant. Of these two alternatives, I think that public policy is in favour of the latter, and I am not able to discover any mischief that is likely to result from such an enactment. Of course the provision which now exists as to the lapse of the living, in case it remains vacant more than six months, might continue in full force, or be made even more stringent.

Upon the whole it appears to me, that so long as patronage may be bought and sold, it would not be an unwise or impolitic enactment, to declare, that the clergy and laity were henceforth to be put on the same footing, in matters connected with the sale and purchase of presentations and advowsons; or, if it is thought too sweeping a change, to allow patrons of livings to receive pecuniary consideration from the presentee directly, as

they are now able to do indirectly, through the medium of the relative or friend who purchases the benefice on behalf of the presentee, that, at all events, it should be made legal, for any other person, under any circumstances, and with the privity of the presentee, to purchase for the latter the living; and thus get rid of the many perplexing and ensnaring questions which constantly arise.

In the next place, I would suggest the propriety of considering, whether the oath, which by the 40th Canon must now be taken by every presentee, or other spiritual person who receives preferment, might not advantageously be abolished. To many tender consciences, undoubtedly, it presents serious difficulties, even where the preferment has been obtained by means strictly legal, and it is to be feared that it is too often taken in cases where, to say the least, some evasion is practised, and some quibbling distinction taken, whereby it is thought that the damning sin of perjury may be avoided.

Let me here quote the opinion of one, than whom no man was ever more clear-sighted as to the practical bearing of a question, although I altogether dissent from the view which he takes of the basis and principles of moral obligation,—I mean Paley. He says, (*a*) "I "doubt not that the oath against Simony is binding "upon the consciences of those who take it, though I "question much the expediency of requiring it. It is

(*a*) Moral Philosophy, Book III. Part I. cap. 20.

" very fit to debar public patrons, such as the King, the " Lord Chancellor, Bishops, Ecclesiastical Corporations, " and the like, from this kind of traffic: because, from " them may be expected some regard to the qualifications " of the persons whom they promote. But the oath lays " a snare for the integrity of the clergy; and I do not " perceive that the requiring of it, in cases of private " patronage, produces any good effect, sufficient to com- " pensate for this danger."

But, if it is thought right to retain this oath, at all events, with regard to those who are *Simoniacè promoti*, and are themselves wholly innocent of any share in, or knowledge of, the Simoniacal transaction, I would suggest the expediency of settling the law otherwise than at present, so as to remove all doubt as to their position.

They now run the imminent risk of being made to suffer for an offence on the part of others of which they are wholly guiltless. And a change in the law, as respects them, might be effected, without at all diminishing the punishment due to those who are the actual offenders.

But I may be asked, if I am prepared to advocate a system under which it should be lawful for the Crown and Episcopal Bench, to make, from time to time, sales of the patronage which they respectively possess? I answer, decidedly not. At present, there exists a wide and intelligible distinction between these two cases and that of private patrons. So far as I know, neither to

the Crown nor to the Bishops has it *ever* been competent to sell their patronage, in the case of any particular living; and it is most desirable that there should exist some such patrons, as can have no temptation whatever to derive pecuniary benefit from the advowsons they possess. Besides, as regards the Bishops, it is obvious how closely allied to Simony such a practice would necessarily become; for they are the parties who ordain, and, in the case of their own patronage, afterwards collate, which is the same as present and institute, the person on whom they confer the benefice.

But I will not pursue this part of my subject at greater length. I have neither the ambition nor presumption to attempt to frame the proper legislative provisions in this important branch of Ecclesiastical Law. I shall have accomplished my object, if I succeed in calling the attention of those, who are far more competent than I am to point out the fitting remedies, to the anomalous, and, as I think, injurious state of the law as it now stands. At present, it holds out temptations to evasion almost irresistible. There is hardly a newspaper which does not contain amongst its advertisements instances of this. And the offence is looked upon with a lenient eye by the community at large. A man's character appears to suffer little if it is known or suspected that he has been engaged in a Simoniacal transaction. But this state of things ought not to be permitted to continue. When a law has fallen into general disrespect, and its infraction goes unpunished, it had better be abolished. Lord Bacon says, forcibly and truly, "There is a further in-

" convenience of penal laws, obsolete and out of use; " for that it brings a gangrene, neglect, and habit of dis- " obedience upon other wholesome laws, that are fit to " be continued in practice and execution." I think that this is the case at present with respect to the laws against Simony, and I have, I hope, succeeded in demonstrating that a revision of them is not only expedient but necessary. But I am by no means equally sure that I have pointed out the alterations best suited to the nature of the case. With regard to these, opinions may differ widely. The fittest remedies might, perhaps, be proposed by the Right Reverend members of the Episcopal Bench. I shall have done enough in calling attention to the subject, and in the words of an eminent man of former days, I will conclude by saying, " I have " stirred these points, but I leave it to abler heads to " settle them."

THE END.

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